STATE OF MICHIGAN

COURT OF APPEALS

600 EAST 11 MILE, LLC, Plaintiff-Appellee,	UNPUBLISHED November 30, 2010
v	No. 293456 Oakland Circuit Court
JOHN DEMUCH, Defendant-Appellant.	LC No. 2007-086578-CK

Before: BECKERING, P.J., and JANSEN and TALBOT, JJ.

PER CURIAM.

In this commercial lease dispute, defendant John Demuch appeals as of right the trial court's order granting plaintiff 600 East 11 Mile, LLC summary disposition under MCR 2.116(C)(10), and awarding plaintiff damages. We reverse and remand.

I

Plaintiff owns the property at 600 East 11 Mile Road in Royal Oak, Michigan. It entered into a five-year commercial lease with defendant, who was an antiques dealer. The lease was effective October 12, 2005 through October 31, 2010, and provided for a monthly rent of $3,500. Paragraph 17 of the lease, however, allowed for plaintiff to terminate the agreement at its discretion. The paragraph states:

> **17. Early Termination.**
>
> Landlord may terminate this Lease by providing John Demuch one hundred eighty (180) days prior written notice of its election to so terminate this Lease. Rent shall be due and payable during such one hundred eightieth [sic] (180) day period pursuant to the terms of this Lease. Should Landlord elect to terminate this Lease under this Paragraph 17, John Demuch shall vacate the Premises within six (6) months of its receipt of notice from Landlord, or such earlier date as John Demuch may elect, provided, however, that in all events John Demuch shall remain liable and responsible for the payment of all Rent due under this Lease until such time as John Demuch vacates the Premises. See 17A.

Paragraph 17A, which was inserted by the parties at the end of the lease, states:

It is understood by and between landlord and tenant that during the first 12 months of this 5 year lease term, the tenant shall have the right to use the space for the entire 12 months without cancellation of the lease agreement per paragraph 17.

Landlord hereby guarantees tenant uninterrupted occupancy of premises at a base rate for the initial 12 month period, nothing herein to the contrary. *In the event landlord chooses to exercise early termination per paragraph 17*, tenant shall have right [sic] to continue said occupancy for months 13-18 at a rate not to exceed $4,000 per month.

Tenant furthermore shall have option to guarantee said occupancy for months 19-24 at a rate not to exceed $4,250 per month, nothing herein to the contrary. (Emphasis added.)

On December 28, 2006, plaintiff sent defendant a letter stating in part:

You have completed a year in your lease term. Per your lease, please forward the following in order to catch up with the current lease rate of $4000 a month. As stated in your lease agreement Months 13-18 are at a rate of $4000 per month and 19-24 are at a rate of $4250 a month.

November: Paid $3500
Correct Lease Amount $4000
Currently Owe $500

December Paid $3500
Correct Lease Amount $4000
Currently Owe $500

Plaintiff's letter indicated that defendant owed $1,000 and was to pay $4,000 per month thereafter. Defendant did not pay the extra money allegedly owed, and instead, continued to pay $3,500 per month. Plaintiff sent defendant monthly invoices seeking payment of $4,000 per month in rent, as well as an accumulating rent balance equal to $500 for each month defendant had paid only $3,500 instead of $4,000 dating back to November, 2006. Plaintiff also sent defendant several letters over the ensuing months, referring at various times to the rent increase "per the lease agreement" or "per the rental agreement" and the "rental increase letter sent to you dated December 28, 2006," and instructing defendant that he must make up the balance of the rent owed.

On April 25, 2007, defendant sent plaintiff a letter "to summarize the highlights of our recent telephone discussion and our meeting" and stating that in response to plaintiff's decision to terminate the lease under paragraphs 17 and 17A, he was exercising his right to vacate the premises on May 31, 2007. Apparently, defendant later expressed a desire to vacate the premises on June 30, 2007.

Plaintiff sent defendant an invoice dated June 1, 2007 seeking $4,000 in rent.

On June 18, 2007, plaintiff sent defendant a "Demand for Possession Non-Payment of Rent," claiming that defendant owed $10,500 for past due rental payments, plus late fees and interest, although no itemization of the amount due was provided.[1] The demand letter reflected a monthly rate of $3,500.

On June 24, 2007, defendant held a liquidation auction at the premises. He vacated by the end of the month.

On June 26, 2007, plaintiff sent defendant a letter disputing that it was attempting to terminate the lease.[2] The letter explained that "[t]here appears to have been some confusion" or a "potential misunderstanding" regarding when the base rent would increase, but that plaintiff never referenced Paragraph 17 of the lease and never used the words "terminate" or "termination" in its letters seeking increased rental payments. Accordingly, plaintiff was not relieving defendant of the five-year lease obligation.

In December 2007, plaintiff leased the premises to "Goldstar Mortgage/Elk Finance" (hereinafter "Elk Finance"). Elk Finance made a "buildout payment" to plaintiff, which, in turn, spent those funds. Elk Finance, however, never took occupancy of the premises or paid any rent.

Before leasing the premises to Elk Finance, plaintiff filed this action, alleging that defendant breached the lease between the parties. Plaintiff subsequently moved for summary disposition under MCR 2.116(C)(10), arguing that defendant breached the lease by vacating the premises without paying the full amount of rent owed. Plaintiff further argued that billing defendant $4,000 per month after the first year of the lease could not be construed as an intent to terminate the lease; rather, it was merely a mistake. Plaintiff indicated, however, that the amount of its damages should be determined by the trial court at a separate hearing. In response, defendant argued that because plaintiff attempted to terminate the lease, he had the right to vacate the premises under paragraph 17A. Defendant also argued that even if he breached the lease, plaintiff breached first, rendering any claim by plaintiff not actionable.

The trial court granted plaintiff's motion for summary disposition, finding that there was no genuine issue of material fact because plaintiff never communicated an intent to terminate the lease. The court found that defendant breached the lease by failing to pay rent in the amount of $3,500 per month for the five-year term. The court held that defendant owed plaintiff rent for the remainder of the lease term, which was 40 months. Thus, the total amount defendant owed plaintiff was $140,000.

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[1] The letter is dated June 15, 2007, but a proof of service provided at the bottom of the letter reflects a mailing date of June 18, 2007.

[2] The letter is dated June 21, 2007, but a proof of service provided at the bottom of the letter reflects a mailing date of June 26, 2007.

Defendant filed a motion for reconsideration. He argued that the trial court erred in holding that plaintiff was entitled to $140,000 in damages, when plaintiff's own motion for summary disposition acknowledged the need for a separate hearing on the issue of damages. Defendant further argued that plaintiff's lease with Elk Finance created two exclusive rights of possession in the premises, which, under the doctrine of surrender, terminated defendant's obligations under the lease. In addition, according to defendant, plaintiff engaged in activities that delayed Elk Finance's ability to take possession, relieving defendant of his lease obligations. The court upheld its award of damages to plaintiff, stating that plaintiff's reletting of the premises did not constitute an acceptance of surrender nor relieve defendant of any obligation.

II

On appeal, defendant first argues that the trial court erred in granting plaintiff's motion for summary disposition under MCR 2.116(C)(10). We agree.[3]

We review a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Maiden*, 461 Mich at 119-120. All admissible evidence submitted by the parties is reviewed in the light most favorable to the nonmoving party and summary disposition is appropriate only when the evidence fails to establish a genuine issue regarding any material fact. *Id.*; MCR 2.116(G)(6).

In granting plaintiff summary disposition, the trial court held that plaintiff's December 28, 2006, letter and three follow-up letters to defendant only reflected plaintiff's "misunderstanding concerning the amount of rent due under the terms of the lease" and not an intent to invoke the early termination provision of the lease. As indicated, the December 28, 2006, letter references a current lease rate of $4,000 per month, "[p]er [the] lease." The letter then explains the rental rate, stating: "As stated in your lease agreement Months 13-18 are at a rate of $4000 per month and 19-24 are at a rate of $4250 a month." Two of plaintiff's follow-up letters reference a rate of $4,000 per month "per the rental agreement" or "per the lease agreement." While none of the letters explicitly state that plaintiff was terminating or intended to terminate the lease, the only provision in the lease modifying the monthly rental rate is paragraph 17A, which pertains to early termination of the lease. The sentence that addresses an increase in the rental rate is preceded by the phrase, "In the event Landlord chooses to exercise early termination per paragraph 17. . . ." As the trial court itself acknowledged, reading the lease as a whole and considering the unambiguous language of paragraph 17A, "the rent should not have increased to $4000 if Plaintiff did not invoke the early termination clause." Given that plaintiff repeatedly referenced the lease in demanding increased rent from defendant, and that the only provision in the lease modifying the rental rate pertains to plaintiff's right to exercise an early termination, whether plaintiff's actions invoked the early termination clause under the lease is a genuine issue of material fact for the finder of fact. Concluding that plaintiff merely

[3] Because we find there is a genuine issue of material fact, we do not agree with defendant's argument that he is entitled to summary disposition under MCR 2.116(I)(2).

misunderstood the amount of rent due when billing defendant an increased amount on multiple occasions over a period of several months is a credibility determination that should be left to the factfinder. See *Shuler v Mich Physicians Mut Liability Co*, 260 Mich App 492, 519; 679 NW2d 106 (2004) (explaining that where there is conflicting evidence, the question of credibility is left to the factfinder).

Because we find that plaintiff was not entitled to summary disposition under MCR 2.116(C)(10), and we reverse the trial court's order, it is not necessary for us to address defendant's other issues on appeal regarding damages.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Kathleen Jansen
/s/ Michael J. Talbot